

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERARDO GARDUNO,	§	
	§	No. 657, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0311010209
Appellee.	§	

Submitted: September 9, 2011

Decided: December 9, 2011

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

O R D E R

This 9th day of December 2011, it appears to the Court that:

(1) The appellant, Gerardo Garduno, has appealed the Superior Court’s March 24, 2010 and June 17, 2011 denial of his second motion for postconviction relief pursuant to Superior Court Criminal Rule 61 (“Rule 61”). Having reviewed the parties’ briefs, the Superior Court’s June 17, 2011 decision on remand, the parties’ supplemental memoranda, and Garduno’s “motion for injunction,” we conclude that the appeal is without merit and affirm the judgment of the Superior Court.

(2) In November 2003, Garduno was arrested on charges of having raped a young girl. The record reflects that Garduno confessed to having fondled the victim but denied penetrating her.¹

(3) Garduno was indicted in January 2004 on ten offenses arising from the alleged rape. In June 2004, Garduno pled guilty to one count of Attempted Rape in the Second Degree and one count of Sexual Solicitation of a Child. As part of the plea agreement, the State agreed to dismiss the other charges, which included four counts of Rape in the First Degree, and to recommend no more than twelve years at Level V. After a pre-sentence investigation, the Superior Court sentenced Garduno, on September 24, 2004, to fifteen years at Level V suspended after eleven years for decreasing levels of supervision.

(4) Garduno did not file a direct appeal from his 2004 conviction and sentencing, and he also did not appeal the Superior Court's denials of his sentence modification motions filed in 2004 and 2007. Garduno did, however, file an appeal from the Superior Court's 2009 dismissal of his first motion for postconviction relief.

(5) In his appeal from the denial of his first postconviction motion, Garduno claimed that his confession had been coerced. When affirming the

¹ *Garduno v. State*, 2009 WL 3451912, at ¶ 2 (Del. Supr.).

Superior Court's judgment, however, we concluded that "[g]iven the absence of any support for [his] claim of a coerced confession," Garduno could not overcome the procedural bars of Rule 61.²

(6) In his second motion for postconviction relief, Garduno claimed ineffective assistance of counsel based on his defense counsel's alleged failure to investigate and develop facts supporting his claim of a coerced confession. Garduno also claimed that his defense counsel was ineffective for failing to file a direct appeal from the 2004 conviction.

(7) Garduno's second postconviction motion was referred to a Commissioner for a report and recommendation. By report dated February 26, 2010, the Commissioner recommended that the motion should be summarily dismissed under Rule 61³ as untimely⁴ and repetitive.⁵ By order dated March 24, 2010, the Superior Court adopted the Commissioner's report and recommendation and denied Garduno's second motion for postconviction relief. This appeal followed.

(8) Upon submission of the parties' briefs and review of the record, the Court discovered that the Superior Court had not considered Garduno's

² See *Garduno v. State*, 2009 WL 3451912, at ¶ 6 (Del. Supr.).

³ See Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to postconviction relief).

⁴ See Del. Super. Ct. Crim. R. 61(i)(1) (barring claim filed more than three years after judgment is final) (amended 2005 to reduce filing period to one year).

⁵ See Del. Super. Ct. Crim. R. 61(i)(2) (barring "[a]ny ground for relief that was not asserted in a prior postconviction proceeding").

objections to the Commissioner's report.⁶ Thus, by Order dated June 13, 2011, we remanded the case to the Superior Court for consideration of Garduno's objections.

(9) By order dated June 17, 2011, the Superior Court, after considering Garduno's objections, again adopted the Commissioner's report and denied Garduno's second postconviction motion. Upon return of the matter from remand, the parties filed supplemental memoranda in response to the Superior Court's June 17, 2011 decision, and the case was resubmitted for decision.

(10) In his opening and reply briefs on appeal, Garduno expands on the claims that he made in his second postconviction motion, *i.e.*, that his defense counsel was ineffective when he failed to investigate the circumstances leading to Garduno's confession and when he failed to file a direct appeal. For relief from the alleged inadequacies of his counsel, Garduno asks that the Court remand his case for resentencing so that he can file a direct appeal from his 2004 conviction.

(11) In his opening and reply supplemental memoranda, Garduno claims that the Commissioner neglected to "examine, investigate and basically check the facts" of Garduno's claim of a coerced confession, and

⁶ See Del. Super. Ct. Crim. R. 62(a)(5)(ii) (allowing for written objections filed within ten days of a Commissioner's report and recommendation).

he cites inadequacies of the prison law library as cause for his failure to raise ineffective assistance of counsel in his first postconviction motion. Finally, in his “motion for injunction,” Garduno asks that the Court enjoin the prison from requiring his participation in a counseling program requiring that he admit his crimes.

(12) The Court has not considered Garduno’s complaints concerning the prison law library and his request for an “injunction” from having to participate in a prison counseling program. Those matters were not raised in the Superior Court and are not otherwise justiciable in Garduno’s appeal from the denial of his second postconviction motion.

(13) Having carefully considered the parties’ positions on the matters properly raised on appeal, the Court has concluded that Garduno’s second postconviction motion was properly barred under Rule 61 as untimely and repetitive without exception. Garduno’s belated claim that his defense counsel failed to file a direct appeal from his 2004 conviction does not warrant consideration in the interest of justice⁷ or due to a miscarriage of justice.⁸ Second, Garduno has not convinced the Court that his defense counsel’s investigation of the circumstances of his confession would have

⁷ See Del. Super. Ct. Crim. R. 61(i)(2) (barring a claim not raised in a prior postconviction proceeding unless consideration is warranted in the interest of justice).

⁸ See Del. Super. Ct. Crim. R. 61(i)(5) (providing that the procedural bars do not apply to a colorable claim of a miscarriage of justice).

changed counsel's recommendation or that Garduno would have insisted on proceeding to trial.⁹

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

⁹ See *Albury v. State*, 551 A.2d 53, 60 (Del. 1988) (providing that on a claim of ineffective assistance of counsel within the context of a guilty plea, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (quoting *Hill v. Lockhart*, 474 U.S. 52, 58 (1985))).